

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: March 23, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hypercom Corporation

Serial No. 76161777

Deborah K. Henscheid of Snell & Wilmer LLP for Hypercom Corporation.

Colleen Kearney, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Quinn, Hohein and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Hypercom Corporation has filed an application to register FASTCOM (in standard character form) for goods ultimately identified as "external modems for use with point-of-sale terminal systems" in International Class 9.¹

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that

¹ Application Serial No. 77161777, filed November 8, 2000, alleging a bona fide intent to use the mark in commerce.

applicant's mark, when used on its identified goods, so resembles the registered mark FASTCOM (in standard character form) for "computer circuit boards and instructional manuals sold therewith" in International Class 9,² as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

² Registration No. 1549912, issued August 1, 1989, Section 8 affidavit accepted.

The marks, FASTCOM, are identical, which is a factor that favors a finding of likelihood of confusion. We turn then to a consideration of the goods, keeping in mind that use of identical marks is a fact which "weighs heavily against applicant." In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); see also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

The examining attorney contends that applicant's goods, "external modems for use with point-of-sale terminal systems," and registrant's goods, "computer circuit boards," "fall under the category of computer hardware, or components of computer systems." Br. p. 6. Further, the examining attorney argues that "applicant's goods are of a kind that registrant could logically expand into manufacturing." Id. In support of her argument, the examining attorney submitted thirteen use-based third-party registrations that include, in each instance, both circuit boards and modems in the identifications of goods as evidence that such goods are of a kind that emanate from the same source. See, e.g., Reg. No. 2654444 for the mark ASOUND for, inter alia, circuit boards and modems; Reg. No. 2812400 for the mark GAINWARD EXPERT UPDATE for, inter alia, computer circuit boards and modems; Reg. No. 2763627

for the mark RAIDMAX for, inter alia, circuit boards and modems; and Reg. No. 2655315 for the mark VERITON for, inter alia, circuit boards and modems.

It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider registrant's goods as they are described in the registration and we cannot read limitations into those goods. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). Thus, if the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). Finally, in this case,

where the marks are identical, the relationship between applicant's and registrant's goods need not be as close to support a finding of likelihood of confusion. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1992).

Applicant argues that the third-party registrations "fail to disclose any overlap between the goods recited by registrant and applicant" inasmuch as "none of the cited registrations recite both 'circuit boards' and 'external modems for use with point-of-sale terminal systems.'" App. Br. p. 3. However, applicant's goods are "necessarily included in the broader category of modems" (examining attorney br. p. 7) and, therefore, the third-party registrations are probative evidence of the overlap between applicant's and registrant's goods. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). Applicant also argues that registrant "manufactures circuit boards that are sold to 'industrial/commercial and OEM customers'" (br. p. 3.), in contrast to applicant's goods which are purchased by financial transaction processors and independent sales organizations. Applicant supports its statements with applicant's technical information sheet and excerpts from registrant's website; however, an applicant

may not restrict the scope of the goods or the channels of trade covered in the registrant's registration by extrinsic evidence. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

When we consider registrant's and applicant's goods as they are described in the registration and application, and in light of the legal constraints cited above, we find that they are sufficiently related that when used under identical marks potential purchasers would likely be confused as to their source. See *Otocom Systems Inc. v. Houston Computer Services Inc.*, supra. As the examining attorney stated and applicant did not contest, circuit boards and modems are universally used in computers and computer systems. Moreover, as demonstrated by the evidence of record, circuit boards and modems frequently emanate from the same source under the same mark. Finally, inasmuch as there are no limitations in registrant's identification of goods, they could be used in computers that are part of a point-of-sale terminal system. Therefore, the channels of trade and class of purchasers necessarily overlap.

In reaching our decision, we have considered applicant's contention that both applicant's and registrant's goods are "usually purchased after

careful consideration by knowledgeable persons." Br. p. 4. We first note that the registration does not contain any limitation on the channels of trade or intended customers and, thus, the potential class of purchasers of registrant's goods includes any consumer of computer circuit boards. We also note that even applicant tempered its argument with the term "usually." As the examining attorney stated, "where the relevant consumer is comprised of both professionals and the general public, the standard of care when purchasing the goods is equal to that of the least sophisticated purchaser in the class." Br. p. 9. See *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301 (TTAB 2004). To the extent, nonetheless, that the goods in issue would most likely be purchased with care by sophisticated consumers, we find that the identity between the marks and the relatedness of the goods clearly outweigh any purchaser sophistication. In *re Decombe*, 9 USPQ2d 1812 (TTAB 1988); In *re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). Moreover, the fact that purchasers are sophisticated in a particular field does not necessarily mean that they are knowledgeable in the field of trademarks or immune from source confusion. In *re Total Quality*

Ser No. 76161777

Group Inc., 51 USPQ2d 1474 (TTAB 1999); In re Hester Industries, Inc., 231 USPQ 881 (TTAB 1986).

In conclusion, we find that, given the use of identical marks on these related goods, confusion is likely. To the extent that any of the points raised by applicant raises a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. In re Martin's Famous Pastry Shoppe, Inc., *supra*.

Decision: The refusal to register is affirmed.